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R. Dixon, Democratic Representation, Oxford Univ. Press (1968) 29, 60

Supreme Court of the United States

October Term, 1971

No. 71-364

JOAN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

CLIVE L. DUVAL, 2D. ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

STANFORD E. PARRIS, ET AL.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF ON BEHALF OF APPELLANTS

OPINION OF THE COURT BELOW

The opinion of the three judge United States District Court for the Eastern District of Virginia, in this case, is reported at 330 F.Supp. 1138 (1971) as *Howell* v. *Mahan*, and is also found at page 1 of the "Joint Appendix of the City of Virginia Beach and Virginia State Board of Elections—Joan S. Mahan, et al." (J.A.)[1]

JURISDICTION OF THE COURT

This Court has jurisdiction over the instant case as provided for by 28 U.S.C. § 1253.

The opinion and order of the court below was filed on July 2, 1971. Notice of Appeal was filed on July 13, 1971 (J.A. pp. 49-50) and the Jurisdictional Statement on September 11, 1971. Probable jurisdiction was noted by this Court on April 17, 1972. By letter of May 22, 1972, the time within which to file the instant brief was extended to and includes June 30, 1972.

THE STATUTES INVOLVED

This appeal involves the validity of two state statutes, being the 1971 Virginia Legislative Reapportionment Acts for both Houses of the Virginia General Assembly—the Senate and House of Delegates.

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[1] To avoid duplication of printing, the appendix provided for by Rule 36 incorporates by reference the Joint Appendix of the City of Virginia Beach and Virginia State Board of Elections—Joan S. Mahan, et al., previously prepared as a separate document and submitted with the Jurisdictional Statements of the City of Virginia Beach and the Virginia State Board of Elections—Joan S. Mahan, et al. Such Joint Appendix will be referred to as (J.A.) and the Appendix prepared pursuant to the provisions of Rule 36, as (A).

Chapter 116 of the 1971 Acts of Assembly, p. 198, codified as Section 24.1-12.1 of the Code of Virginia (1950), as amended, 1971 Cumulative Supplement, Vol. 5, p. 74-75, created fifty-two (52) house districts and distributed and apportioned the one hundred members of the House of Delegates throughout such districts for purposes of representation. Chapter 120 of the 1971 Acts of Assembly, p. 219, as amended by Chapter 246, p. 499, codified as Section 24.1-14.1 of the Code of Virginia (1950), as amended, 1971 Cumulative Supplement, Vol. 5, pp. 75-81 amending Chapter 120 not as yet codified, divided the Commonwealth into forty (40) *single* member senatorial districts for each member of Senate.

Due to the length of these statutes they are not set forth herein verbatim but their text is set forth in the Joint Appendix (J.A. pp. 31-43).

The reapportionment statutes were enacted pursuant to the provisions of Art. II, Sec. 6, of the Constitution of Virginia which reads as follows:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

THE QUESTIONS PRESENTED

The reapportionment statutes of the Commonwealth were the genesis of extensive litigation, which culminated in the noting of probable jurisdiction by this Court in the instant case as well as in *City of Virginia Beach* v. *Howell,* No. 71-373, and *Thornton* v. *Prichard,* No. 71-553.

The questions presented in the instant appeal are compatible with those presented by the City of Virginia Beach in No. 71-373 and are as follows:

> Did the court below err in declaring Virginia's Legislative Reapportionment Acts of 1971 violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution insofar as the court (1) ordered in the Legislative Districts for the House of Delegates fragmentation of political jurisdictions despite the fact that the evidence demonstrated that the districts were as close to mathematical exactness as possible, keeping intact political jurisdictions; (2) ordered as to the Legislative Districts in the Senate, the creation of a three-man multimember district despite the fact that the General Assembly as to that body desired complete single-member districts; and (3) enjoined appellants from conducting any elections except in those electoral districts created, established and specified by the court, despite the fact that the Virginia General Assembly made known its intent to enact any new reapportionment legislation required by any Constitutional requirement decreed by the court?

Appellants, in the instant brief, also present argument on the question raised in *Thornton* v. *Prichard,* wherein they are the appellees: whether the court below erred in upholding the multimember House of Delegate districts, originally objected to by the Attorney General of the United States, which objections were subsequently withdrawn.

STATEMENT OF THE CASE

This appeal is taken from an Interlocutory Order of the United States District Court for the Eastern District of Virginia entered in the instant cases on July 2, 1971. The appellants, defendants below, are the Secretary of the Virginia State Board of Elections and the members thereof. The appellees, plaintiffs below, are registered and qualified voters of the Commonwealth of Virginia, as are the plaintiff-intervenors. Defendant-intervenors include the cities of Norfolk and Virginia Beach as well as other registered and qualified voters of the Commonwealth. The cases were consolidated for hearing before the four judges who constituted the three-judge panels.[2]

Three separate suits were filed by plaintiffs in the District Court seeking to enjoin the Virginia State Board of Elections from conducting the upcoming elections for membership in the General Assembly of Virginia in the legisla-

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[2] Civil Action No. 105-71N, *Howell* v. *Mahan,* was filed on March 3, 1971, application for injunction being made to the District Judge of the Norfolk Division of the United States District Court for the Eastern District of Virginia. Civil Action No. 174-71-R, *DuVal* v. *Prichard,* was filed shortly thereafter on March 8, 1971, application for injunction being made to the District Judge of the Richmond Division. Though not consolidated, the same three-judge court was appointed pursuant to 28 U.S.C. § 2284 to hear the matters; the court was composed of a judge of the United States Court of Appeals for the Fourth Circuit and the two District Judges to whom application for injunction was made in each case respectively. Subsequently, Civil Action No. 111-71-A, *Parris* v. *Prichard,* was filed on March 22, 1971, application for injunction being made to the District Judge of the Alexandria Division. A separate three-judge court was appointed to hear this matter, composed of the District Judges to whom application for injunction was made as well as the Circuit Judge and a District Judge previously appointed to the other cases.

By order of the court entered on April 7, 1971, the cases were consolidated "for trial and hearing, before the respective three-judge courts" theretofore designated, and the hearing proceeded before a "four-judge" court.

tive districts created by the General Assembly at its 1971 Extra Session; which session and which action of reapportioning was mandated by the Virginia Constitution of 1971, Article II, Section 6, and the "Schedule" Section 5.[3] The Commonwealth of Virginia has traditionally elected her representatives to the State General Assembly in the odd years; terms for members of the House of Delegates being two years and for the Senate, four years. The entire membership of both Houses of the General Assembly was elected this year in November of 1971,[4] and thus from the newly redistricted seats—those mandated by the court.

Pursuant to the requirements of reapportionment, the General Assembly, by Acts approved March 1, 1971,[5] divided the one hundred member House of Delegates into

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[3] Schedule, Section 5. "The General Assembly shall convene at the Capitol at noon on the first Wednesday in January, nineteen hundred seventy-one. It shall enact such laws as may be deemed proper, including those necessary to implement this revised Constitution. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with Article II, Section 6, of this Constitution. The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; that the salary and allowances of members shall not be limited by Section 46 of the Constitution of 1902 as amended and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative."

[4] "§ 24.1-11. The members of the House of Delegates shall be elected on the Tuesday succeeding the first Monday in November, nineteen hundred seventy-one, and every two years thereafter for a term of two years to begin on the second Wednesday in January succeeding their election."

"§ 24.1-13. Members of the Senate of Virginia to represent each senatorial district of the Commonwealth shall be elected on the Tuesday after the first Monday in November, nineteen hundred seventy-one, and every four years thereafter, for a term of four years, to begin on the second Wednesday in January succeeding their election."

[5] Acts of Assembly, 1971, cc. 116, 120.

fifty-two districts. The redistricting was a traditional combination of single and multimember districts as well as floater districts. See *Davis* v. *Mann,* 377 U.S. 678, 84 S.Ct., 1441, 12 L.Ed.2d 609 (1964). In no case did the plan for the House of Delegates abandon the political jurisdictional lines of the counties and cities and an attempt was made to insure that such lines were maintained and not fragmentized. Although the ten delegates allotted to the County of Fairfax were divided into two five-member multimember districts, Fairfax County, though divided, was not fragmentized, i.e., a *portion* of such jurisdiction being placed with any other political jurisdiction.

The deviations from absolute equality of population arrived at by the redistricting of the House ranged from an under-representation of plus 9.6% to an over-representation of minus 6.8%, or a total variance of 16.4%. As noted by the Court, however, the 42nd District, a floater shared by the cities of Chesapeake, Portsmouth and Virginia Beach would have as to that one instance increased the total variance to 23.6%.

In the forty member State Senate, the General Assembly created forty single-member districts. The application of this single-member district policy for the upper house did create some fragmentizing of political jurisdictions in twelve instances out of the one hundred thirty-eight political jurisdictions (counties and cities) in the Commonwealth.

The division of the City of Norfolk into three single-member Senatorial Districts, one of which included a portion of the City of Norfolk and a contiguous portion of the City of Virginia Beach, were the districts under attack in the senatorial suit. The three districts, known as the Fifth, Sixth and Seventh Senatorial Districts, had populations of 116,084, 116,103, and 115,959, respectively. Since each,

ideally, should have 116,212, the percent deviations from the norm for the three districts were minus 0.1%, minus 0.02%, and minus 0.2%, respectively.

The redistricting of the Senate was done entirely on the basis of the numbers provided by the 1970 Decennial Census. The population of the Norfolk Naval Base, as enumerated by the Bureau of Census, consisted of 36,693 individuals stationed aboard ships. The Census tract containing such enumerated personnel was allocated to the Fifth Senatorial District, where the U.S. Naval Station was geographically situated. The evidence introduced showed that approximately 21,000 of these individuals enumerated in the Fifth District did not, in fact, "reside" there in the legal context of the word, and further that some 9,000 of those 21,000 did not even reside in the Sixth or Seventh Districts as well. It was contended that the only manner of correcting this alleged inequity would be to combine the Fifth, Sixth and Seventh Districts into a three-member multi-member Senatorial District so that these Naval personnel home-ported at Norfolk could be spread over a wider area.

The cases were originally set for consolidated trial in the District Court on May 24, 1971. On May 7, 1971, however, the Attorney General of the United States, acting pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), interposed objections to Virginia's reapportionment plans as related to both the House of Delegates and the Senate. Objections to the House plan were based on *Chavis* v. *Whitcomb,* 305 F.Supp. 1364 (S.D. Ind. 1969), then pending decision in this Court and were directed to five multimember districts in certain metropolitan areas. Objection to the Senate plan was confined to the route of the dividing line between the Fifth and Sixth Senatorial Districts in the City of Norfolk. As a result of these objec-

tions, the District Court, on May 24th, directed that the instant cases be continued until June 15, 1971, and further directed the General Assembly, which had remained in session since January of 1971, to act to remove the objections of the Attorney General, stating:

> (c) That unless on or before June 15, 1971, Virginia has adopted and submitted reapportionment legislation either to the Attorney General of the United States or to the District Court for the District of Columbia for declaratory judgment as provided for in Section 5 of the Voting Rights Act, this Court shall proceed with the trial of these suits and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation; . . . . (See J.A. pp. 43-46.)

Following this action, this Court on June 7, 1971, handed down its decision in the case of *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), thus precipitating removal by the Attorney General of the objections to the House plan. (J.A. p. 53). The General Assembly then enacted an amendment to the Senate Plan for redrawing the line between the Fifth and Sixth Senatorial Districts to remove the remaining objection of the Attorney General,[6] and the instant cases proceeded to trial on June 16, 1971. Black plaintiff intervenors, who had by then appeared in the case (their intervention was granted on May 18, 1971) urged the court to hold that the Attorney General of the United States erred in withdrawing his objection, or in the alternative that the court declare the multimember House districts in five major cities of Virginia invalid on the ground that

[6] Acts of Assembly, 1971, c. 246. (See also J.A. p. 51, letter of David L. Norman, Acting Assistant Attorney General, Civil Rights Division, dated August 13, 1971, approving Chapter 246 [S.B. 125]).

they are inherently discriminatory, depriving "Negro citizens of a chance to elect one (or more) of their race to the General Assembly." *Mann* v. *Davis,* 245 F.Supp. 241 (E.D. Va.), aff'd sub. nom., 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965). The latter position was asserted on the ground that due to the applicability to Virginia of the Voting Rights Act, the burden was on the Commonwealth (despite no objection of the Attorney General) to demonstrate that the redistricting would not have the purpose or effect of diluting black voting strength. The District Court denied both requests. As to the contention of the other plaintiffs however, the court in its Interlocutory Order declared and adjudged Chapters 116 and 120 (as amended by Chapter 246) of the Acts of Assembly of 1971, generally known as the reapportionment statutes, to be invalid as violative of the Equal Protection Clause of the Constitution of the United States. The District Court went on to devise its own reapportionment plan for the Virginia House of Delegates, as found in its opinion, and the Court further directed that Senatorial Districts Five, Six, and Seven, comprised of the City of Norfolk and a portion of the City of Virginia Beach, be consolidated into a single district from which three state senators are to be elected at large. The court also rearranged the multimember House district in the City of Norfolk, upholding it, but expanding it to include a portion of the City of Virginia Beach (not the same portion of the City of Virginia Beach which the court ordered joined to the City of Norfolk for the creation of the multimember Senatorial district). It was directed that all elections in Virginia, including those scheduled for November 2, 1971, be held pursuant to the court's plan, the Order stating:

> 2. That members of the Senate and of the House of Delegates of the General Assembly of Virginia be

elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;

3. That such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid; . . . .

SUMMARY OF ARGUMENT

I.

The Court, In Its Blind Adherence To Numbers Only, Erred In Fragmenting Political Jurisdictions In The House Legislative Districts.

This Court has consistently upheld the right of a state to choose the form of representational government best suited to the needs of its people. A balancing of both houses of a bicameral legislature has been sanctioned as has adherence to political jurisdictional lines. Because of this, and rightfully so, no set numerical variance has ever been established. Each plan must be individually devised by looking at the entire state to be reapportioned. All that has ever been required is a conscientious and good faith effort to achieve equality. This the General Assembly of Virginia was found to have done. To apply the mathematical exactness standards of Article I, Section 2, as laid down in various congressional redistricting cases, is to repudiate all past decisions relating to flexibility that a state must have to govern herself and to ignore well established concepts of federalism. The application of strict mathematical exactness alone ig-

nores all past constitutional premises and becomes only a game of numbers.

II.

The Imprecise Creation Of A Multi-Member Senatorial Seat Was Without Any Constitutional Basis And Further Disrupted Valid Legislative Policy.

The Virginia General Assembly, in drafting the reapportionment legislation here at issue, was presented with the initial problematic decision of what empirical data was constitutionally acceptable to provide the basis for a redistricting plan, and which at the same time best indicated the true number of individuals requiring representation in the Virginia legislature. In selecting the broadest possible base (a census of total population), the General Assembly's decision that all people residing in the Commonwealth, citizen or not, voter or not, would be encompassed in the redistricting effort and would receive proportional reprensentation in the legislature, was constitutionally permissible.

Reduced to its essentials, the issue before this Court concerns the validity of the Virginia General Assembly's reliance on the method and manner utilized by the United States Bureau of the Census in enumerating the population of the Fifth Senatorial District, and its refusal to rely on the product of a sample survey conducted on the basis of zip codes alone. The latter was accorded by the District Court greater weight than the enumeration of the United States Bureau of the Census, on the basis of an assertion that registered voters in each senatorial district did not approximate the population of such district. Such an allegation, however, raises no constitutional deficiency.

III.

The Requirement Of The District Court That Elections Be Conducted Only From Districts Mandated By Court Order Runs Afoul Of Every Decision Of This Court Which Recognizes The Doctrine Of Federalism And Separation Of Powers.

The action of the District Court in drafting a redistricting plan of its own and mandating that all elections for the Virginia General Assembly be held from the districts as redraw constituted a flagrant example of judicial legislation. By failing to honor the well defined dichotomy between judicial determination of the constitutional limitations which govern reapportionment efforts and the inapporpriateness of peremptory judicial relief in such instances the court, without justification in fact or in law, usurped the prerogative of the Virginia General Assembly.

IV.

The Voting Rights Act Allegations Raised In The Thornton Appeal, Coupled With Allegations Of Fourteenth Amendment Denial, Are Without Merit.

Despite this Court's decision in *Whitcomb* v. *Chavis, supra,* combined with the fact of the Commonwealth's compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), the black plaintiff intervenors have pursued their challenge to the multi-member districts encompassing the City of Richmond and similar districts throughout the Virginia Commonwealth. In so doing, the intervenors assume the anomalous position of conceding that they are unable to prove that the multi-member districts operate as instruments of racial or economic discrimination. Rather, they make the wholly untenable assertions that, first, the Attorney General of the United States erred in withdrawing his objection to the redistricting plan after the

announcement of the *Chavis* decision, *supra,* and, further, that because there has been racial discrimination in the past the courts should put the Commonwealth to the burden of proving itself free from discrimination in reapportionment.

The practice and concept of multi-member districting were given express approval by this court in *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and *Fortson* v. *Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed. 2d 401 (1965). Moreover, Virginia has maintained a tradition of honoring the integrity of city and county lines in effectuating reapportionment, a tradition approved by this Court in *Davis* v. *Mann, supra.* No discrimination being shown by black appellants, the Commonwealth of Virginia, having complied with all provisions of the Voting Rights Act, is now entitled to implement its legislative enactment, and stand on a par with all other states.

Should this Court find merit, however, in black appellants' assertion that the Attorney General erred in withdrawing his objection, the Court should nevertheless reject arguments predicated on such error as the Attorney General failed to interpose a timely objection to the reapportionment plan.

ARGUMENT

I.

The Court, In Its Blind Adherence To Numbers Only, Erred In Fragmenting Political Jurisdictions In The House Legislative Districts.

The General Assembly of Virginia, "in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people", *Minnesota State Senate* v. *Beens,* ..... U.S. ....., CCH S.Ct. Bull. (Current Term at B1987), Nos. 71-1024, 71-1145 (Apr. 29, 1972), decided to join

twenty-five sister states[7] and create for an existing bicameral legislature an upper body having exclusively single member districts to balance a lower house which, while maintaining population equality, would observe the traditional guarantee of an independent voice to political jurisdictions, using a combination of single-member, multi-member and floater districts.

In bringing such plan into reality a forty single-member-district Senate plan was drawn, subsequently attacked on grounds other than population disparities, see Argument II, *infra,* and a fifty-two district House plan for the 100 member House was devised, now before the Court on the question of population disparities.

A plethora of controversy has arisen since this Court first entered the "political thicket," but at least three main principles have remained constant. First, when determining the validity of a redistricting plan, consideration must be given to the legislature as a whole rather than an isolated look at each body independently. *Burns* v. *Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Reynolds* v. *Sims, supra.* Second, the fact that a particular degree of deviation has been upheld or, it logically follows, has been declared impermissible has little bearing on the validity of similar variations in other states. In other words, an abstract number cannot be exalted into a constitutional command. *Reynolds* v. *Sims, supra; Swann* v. *Adams,* 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967). Third, the maintenance of political boundaries while maintaining population

[7] California, Colorado, Connecticut, Delaware, Idaho, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah and Wisconsin, are other States which have exclusive single-member districts in their State Senate. See, Book of the States, Apportionment of Legislatures, p. 82.

equality is a valid justification for percentage deviations. Such policy is a constitutionally permissible alternative open to a legislature. *Reynolds* v. *Sims, supra; Minnesota State Senate* v. *Beens, supra; Grivetti* v. *Illinois State Electoral Board,* 335 F.Supp. 779 (N.D. Ill. 1971), *aff'd,* ..... U.S. ....., CCH S.Ct. Bull. (Current Term at B2003), No. 71-1156 (May 25, 1972). Inescapably, if the above principles are to be maintained, the congressional standards of mathematical exactness as set forth in *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969) and *Wells* v. *Rockefeller,* 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 530 (1969), are not necessarily applicable to state legislative redistricting. *Connor* v. *Williams,* ..... U.S. ....., 92 S.Ct. 656, ... L.Ed.2d ..... (1972); *Jackman* v. *Bodine,* 55 N.J. 371, 262 A.2d 389, *cert. denied,* 400 U.S. 849, 91 S.Ct. 39, 27 L.Ed.2d 87 (1970). It is the position of these appellants that because of the variables existent between congressional redistricting and legislative redistricting "[s]omewhat more flexibility . . . [is] *constitutionally permissible* with respect to . . ." the latter. *Reynolds, supra* at 578. (Emphasis supplied.)

As will become apparent, the lower court, in its zeal to legislatively play with census figures, ignored all of the above.

(A)

Comparison of Both Houses

Footnote 13 of *Burns* v. *Richardson, supra,* emphasizes what the lower court ignored: that a total scheme of apportionment best suited to a state's needs is what must be construed, and that total scheme must be what is reviewed. The lower court overlooked this Court's requirement of legislators that:

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State." See also *Holt* v. *Richardson,* 240 F.Supp. 724, 729 (Hawaii 1965).

While this Court has emphasized not only in *Burns* v. *Richardson, supra,* but also in *Maryland Committee For Fair Representation* v. *Tawes,* 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964), that a court in reviewing an apportionment plan must consider the scheme as a whole, and cannot sever one House from the other, the reason for viewing the scheme as a whole was succinctly set forth in *Reynolds* v. *Sims, supra,* the Court stating:

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will

> be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of a single-member district while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis. 377 U.S. at 576.

Yet the District Court ignored completely the balance concept the General Assembly initiated: [t]he balancing of single member districts in one body countering political jurisdictions adhering to population equality in the other. Such was abolished by the District Court's order. For example, the lower court fragmentized Wythe County in the Fourth House District—deviating plus 6.0%—and placed a portion of the county with the Sixth House district—deviating minus 1.5%—without ever looking at the Senate Districts containing the Fourth and Sixth House Districts, which Senate Districts, the Thirty-seventh and Thirty-eighth with deviations of minus 2.5% and plus 0.9%, respectively, balanced off the deviations in the House plan. This should not have been ignored.

Likewise the lower court, looking only at the House plan, fragmentized five thousand eight hundred sixty-three (5,863) citizens of Rockingham County in the Sixteenth House District—deviating plus 9.6%—and, ignoring a nat-

ural impassable boundary, namely, the Blue Ridge Mountains, placed such portion of the county on the other side of the mountain in the Twenty-sixth House District consisting of Albemarle, Greene, Fluvanna Counties and the City of Charlottesville—deviating minus 3.7%—while at the same time fragmenting a portion of Albemarle County consisting of two thousand ninety-two (2092) citizens into yet a third legislative district.

It is submitted that before the District Court, looking only at the House plan, fragmented the County of Rockingham, it should have considered the Senate District comprising Rockingham (the Twenty-sixth) which deviated minus 4.37%.[8]

The populations and percentage deviations for both the House and Senate legislative districts are set forth for the Court's convenience in the Joint Appendix, p. 56 *et. seq.*

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[8] Numerous other examples can be cited, one of which is the court's own redrawing of both the Senate and House seats for the Cities of Norfolk and Virginia Beach. Under the General Assembly's plan, the Senate seats (all single members) for the cities were: one seat for a portion of Virginia Beach, two seats for a portion of Norfolk, and a fourth seat for a portion of Virginia Beach (forty thousand, one hundred ninety-five [40,195] citizens) together with a portion of Norfolk (seventy-five thousand seven hundred sixty-four [75,764] citizens). House seats maintained political boundaries, with a floater being utilized in Virginia Beach. The Court consolidated the two Senate seats in Norfolk with the seat consisting of a portion of Virginia Beach and Norfolk, requiring forty-thousand, one hundred ninety-five (40,195) citizens of Virginia Beach to vote with the total population of Norfolk of three hundred seven thousand, nine hundred fifty-one (307,951). At the same time, the Court fragmented Virginia Beach in the House and instead of balancing the two bodies together by combining in the House a portion of Norfolk with Virginia Beach, it made portions of Virginia Beach vote with the total population of Norfolk in both houses of the General Assembly. The Commonwealth points out this aspect of the court's plan, not in the specific interest of either City, but as an example that with the political considerations inherent in such moves the General Assembly and not the court should have been the author of such a decision.

(B)

Abstract Numbers

A judicious review of such percentage variations produces more than a mere arithmetical calculation of an underrepresentation of plus 9.6% in the 16th District and an overrepresentation of minus 6.5% in the 12th District or a total variance of 16.4%. Not one decision of this Court enunciates a constitutional principle that an abstract numerical variance can be transposed into a requirement of invalidation *per se*.

As recognized since *Reynolds* v. *Sims*, the development of permissible mathematical deviations must be developed "on a case by case basis," 377 U.S. at 578. The extent to which equality may practically be achieved may differ from state to state and from district to district. *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). In *Swann* v. *Adams, supra*, this Court emphasized that simply because a certain percentage variation is upheld in one case, this does not mean that it is authority for all cases to follow:

> . . . the fact that a [certain percentage] variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.' 385 U.S. at 445.

A Court may not therefore either uphold or throw out as unconstitutional mathematical deviations existing in a legislative redistricting plan simply because other cases have, in considering various mathematical variations, found them constitutional, or even found variations of smaller magnitude to be unconstitutional. The goal to be reached by a legislature is not some preconceived artificial percentage

variation. The goal, and the standard which the courts must decide whether the legislature met, is a good faith effort to achieve precise mathematical equality with only the limited population variances which are unavoidable despite this good faith effort or for which justification is shown. *Reynolds* v. *Sims, supra.*

Yet even though each and every decision of this Court requires a determination on a case by case basis whether a good faith effort was made to achieve mathematical equality, the Court below ignored the facts in the House plan and struck down the deviations found therein merely because "[p]lans including a variation of approximately that amount have not survived Supreme Court scrutiny [citations omitted]" thus "the statewide range of deviation [calculated with or without the Chesapeake floater] will not pass constitutional muster." *Howell* v. *Mahan,* J.A. p. 3, fn. 1.

This blind adherence to the tyranny of numbers alone was in the face of the only evidence in the case which showed clearly that the deviations in the House plan were "the minimum [possible] above and below the norm, keeping intact political boundaries. . . ." (Defendants' Exhibit No. 8.)

The plaintiffs in the House suits put on no evidence showing that small deviations in the plan were possible, cf. *Kirkpatrick* v. *Preisler, supra; Swann* v. *Adams, supra.* In fact, they stipulated to Defendants' Exhibit No. 8 and advocated merely a single member districting plan ignoring political boundaries. The Commonwealth would naturally concede that if political boundaries are ignored there is no reason why a percentage of exactness cannot be achieved. As this Court points out, however, "mathematical exactness or precision is hardly a workable constitutional requirement." *Reynolds* v. *Sims, supra* at 577. Conversely, the mathemati-

cal application of maximum deviations in an ad hoc manner is hardly a valid constitutional requirement.

The lower court failed to consider not only the Senate plan, as previously indicated, but it ignored such other factors in the House plan as: the overall average percentage variance being only ±3.89%; the minimum population necessary to elect fifty-one representatives (a majority of the House) being 2,291,543, or 49.29% including the floater districts; the ratio between the smallest (12th District) and largest (16th District) being 1.18 to 1; the fact that of all the House districts, thirty-five (35) were within 4% of perfection and only two exceeded 8%, (seventeen exceeded 4%, nine exceeded 6%) (See App. ....); and, most importantly, its own finding that the deviations existent came as close to mathematical perfection as possible while maintaining political subdivision lines (J.A. p. 5).

Finally, and this must be stressed, the court made its own "legislative" finding as to *its* plan, that it was "a good faith effort to achieve absolute equality," but nowhere was there, nor could there be, the required "judicial" finding that a good faith effort to achieve equality was not made by the Virginia General Assembly. The "conscientious and good faith effort" to achieve equality as nearly as possible is what the District Court grounded the validity of deviations of ±8.79% and —10.62% upon in *Summers* v. *Cenarrusa,* 40 U.S.L.W. 3493 (U.S. Apr. 11, 1972). Nowhere was it found by the Virginia court that the Virginia apportionment structure contained a built in bias which tended to favor particular geographic areas or political interests, or which necessarily tended to favor less populous districts over their more highly populated neighbors, or which catered to political strengths. *Abate* v. *Mundt,* 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971); *Ely* v. *Klahr,* 403 U.S. 108, 91

S.Ct. 1803, 29 L.Ed.2d 352 (1971). Only the numbers captured the court's attention.

The only instance in which the court removed its eye from the abacus was in an erroneous application of *Kirkpatrick* v. *Preisler, supra,* when it moved a delegate from the Tidewater region of Virginia to the Northern Virginia area due to estimated population growth trends. Again acting in a legislative role, the court, citing *Kirkpatrick,* stated that anticipated enlargement is an element that "may be appraised in determining the measure of legislative representation." (J.A. p. 18). The evidence with respect to population trends, however, was conflicting and indicative of the many variables which could daily change population trend projections, including in northern Virginia a decentralizing of the Federal Government (See Griffis Deposition).

The evidence further indicated that as to Tidewater, the City of Virginia Beach has been, and is expected to be, the second fastest growing area in the Commonwealth on a percentage basis. (Griffis Deposition, p. 30). Also "Intervenor's (City of Norfolk) Exhibit #1, in Deposition of Robert Griffis" suggested that Norfolk's population density could drastically increase due to a new building program, thus changing population trend projections. Such findings are simply not relevant, for this Court in *Kirkpatrick* clearly stated, not that courts should consider population trends, but that states "*may* properly consider them." The General Assembly of Virginia chose not to consider such trends. This was a legislative determination the court should have accepted. If such trends were to be utilized, their utilization surely should have been applied "throughout the State in a systematic, not an ad hoc, manner." *Kirkpatrick* v. *Preisler, supra,* at 535. The application of population trends in a single instance can hardly be deemed a systematic application.

In no case, has this Court invalidated a state reapportionment plan containing the representative policies reflected in the Virginia plan.

(C)

MAINTENANCE OF POLITICAL SUBDIVISIONS

The lower court in its redistricting failed to adhere to the legislative policy in the House of maintaining the integrity of political jurisdictional lines. It simply declared that there was no known necessity for adhering to such lines, and thus proceeded to fragment[9] various Virginia counties and cities. It is submitted, however, that tolerance of political jurisdictional lines is justification for some deviation. How much deviation is tolerable has been determined by this Court to be that which is shown unavoidable. The variations in the House plan were shown, by uncontested evidence, unavoidable in the case at bar and the lower Court recognized that dissolving the deviations in the House plan ". . . is not achievable at all if the integrity of political subdivisions is mandated." J.A. p. 5.

The policy of the Virginia General Assembly as to the House plan was to keep intact political boundaries. There was no showing that additional or unnecessary population variances among the legislative districts resulted, and there were, therefore, no variances which the State was mandated to justify. *Kirkpatrick* v. *Preisler, supra,* at 531.

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[9] "Fragment" as used herein is intended to mean the placing of a "portion" of a county or city with another political jurisdiction. Such fragmentation is vastly different from the "dividing" of Fairfax County, Virginia, into two five member, multimember districts. Such division still maintained the County as a whole (no portion was excised) and avoided the criticism contained in *Connor* v. *Johnson,* 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed. 2d 268 (1971). See Eisenberg and David, 1 Member Versus 2, 3, 4 or 5, 55 *National Civil Review,* pp. 78-79 (Feb. 1966) (value of single versus multimember legislative districts assessed, with neither found perfect).

Nor did plaintiffs attempt to show that reliance on political jurisdictional lines was unjustified. Other than an attack on multimember district *per se,* which attack was rejected by the District Court, the attack on the percentage deviations was solely on the ground that lesser variations had been struckdown as unconstitutional.[10] This, as seen, was not a proper method of advocating their alleged unconstitutionality and the Court erred in acceding to this line or argument.

As a matter of law the Commonwealth need not abandon its policy of adherence to political lines, since this Court has recognized such adherence as justifying departure from absolute equality and such recognition is founded as well in previous Virginia cases decided in this Court.

In *Davis* v. *Mann, supra* at 686-87, the Court recognized that Virginia has a tradition of respecting the integrity of the boundaries of cities and counties in drawing lines and thus districts have always been constructed only of combinations of counties and cities and not to be pieces of them, resulting in floterial and multimember districts, both of which have been sustained. As stated in *Reynolds* v. *Sims, supra:*

> A consideration that appears to be of more substance in justifying some deviations from populations-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according to political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are fre-

[10] Only in Congressional cases has this court struck down lesser variances. These cases are inapplicable. See Argument, *infra.*

> quently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." 12 L.Ed.2d at 538. (Emphasis added.)

Swann v. *Adams, supra,* again reaffirmed:

> . . . that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the mainteance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines. 385 U.S. 444.

Recently this Court again reiterated that ". . . a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate* v. *Mundt, supra.* True, the *Abate* decision was based on the peculiar facts existent in Rockland County, New York, and its towns, the local structure of government under scrutiny. However, this Court has long recognized Virginia's tradition of adhering to political jurisdictional lines and affirmed such tradition in *Davis* v. *Mann, supra,* on the same date that it authorized the according of independent representation to political subdivisions, in at least one body of the legislature. *Reynolds* v. *Sims, supra.* Such tradition can be traced back at least to the requirements of the Virginia Constitution of 1850, Article IV, Section 2, which specified apportionment by county and city and also provided for floterial representation as well as rotation in alternating sessions of representatives in the

House of Delegates between two counties with population beyond the representative ratio.[11]

As this Court emphasized in *Reynolds* v. *Sims, supra,* local governments carry out much of the various responsibilities of State government as well as having direct concern in the enactment of numerous local legislative enactments. This alone justifies Virginia's tradition of adherence to political jurisdictions. Moreover, the revised Virginia Constitution now allows for the first time special or local legislation for counties as well as for citiees. Revised Constitution of Virginia, Article VII, Section 2. Those provisions now permit counties the constitutional flexibility formerly afforded only to cities in providing services for their citizens. Of approximately 133 pieces of special legislation introduced in the 1972 General Assembly, approximately 104 originated in the House, the body designed to give an independent voice to the Commonwealth's cities and counties.

Under the Court's plan, a situation could arise where the 1602 citizens of Wythe County, Virginia, who were placed in the Sixth Legislative District are opposed to local legislation pending in the General Assembly for their county. They must voice such opposition to the delegates representing 91,620 other persons in the Sixth Legislative District composed of the Counties of Carroll, Floyd and Montgomery and the City of Radford, rather than oppose only their 20,537 fellow citizens of Wythe County.

The Commonwealth is not asserting that population equality must take a back seat to the policy of maintaining political subdivision lines. Such goal certainly cannot justify extreme population variances. The basic standards of equality of population among legislative districts must be main-

[11] See McKay, Reapportionment: The Law and Politics of Equal Representation, pp. 438-443, for a summary of Virginia reapportionment.

tained. It is submitted, however, that the legislature's plan with its 16.4% overall variance, while according independent voice to political jurisdictions in the House of Delegates, is substantially preferable to the District Court's plan with an overall variance of 10.3%[12] which, in its fragmentation effect in eleven instances throughout the Commonwealth, has decreed "one man-no vote" for many citizens. In most instances these fragmentized segments contain less than three thousand (3,000) persons and as few as one thousand six hundred two (1602) in the case of Wythe County.

Why the adherence to "the traditional integrity in Virginia of city and county lines," *Mann* v. *Davis, supra,* was sanctioned by the district court then and seven years later the same judges saw no need for political jurisdictional lines is inexplicable. As this Court recognized, not only in *Reynolds* v. *Sims, supra,* and *Abate* v. *Mundt, supra,* but most recently in *Minnesota State Senate* v. *Beens, supra,* judicial reapportionment may be justified by the observance of geographical boundaries. *Klahr* v. *Goddard,* 250 F.Supp. 537 (D. Ariz. 1966); *Herweg* v. *Thirty-Ninth Legislative Assembly,* 246 F.Supp. 454 (D. Mont. 1965). See also *Stevenson* v. *West,* ..... F.Supp. ....., C.A. No. 72-45 (D. S.C. April 7, 1972). State legislative apportionment policy may be validly grounded on the integrity of county and municipal boundaries. Cf. *Grivetti* v. *Illinois State Electoral Board, supra.*

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[12] The Court indicates in its conclusion that its under-representation is plus 3.8% and its maximum over-representation is only minus 3.4%. However, the Forty-sixth House Legislative District of the Eastern Shore containing the Counties of Accomack and Northampton was allocated one delegate for a population of 43,446 or a deviation of minus 6.5%. These two counties are a part of the Commonwealth of Virginia, cannot be ignored, and must be included in the determination of any variance arrived at in an overall plan of redistricting.

Finally, it bears repeating that in adhering to political boundaries the General Assembly of Virginia came as close as possible to mathematical exactness. There is not in the instant case, as in *Kilgarlin* v. *Hill,* 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), or *Swann* v. *Adams, supra,* any indication that closer mathematical exactness could be achieved absent obliteration of jurisdictional lines. Since the latter is not required, there is no constitutional requirement that variance in legislative populations be reduced to zero. R. Dixon, *Democratic Representation,* Oxford Univ. Press (1968) p. 446.

It is submitted that, as this Court has previously noted, the congressional standards of mathematical exactness, enunciated in *Kirkpatrick* and *Wells, supra,* do not (and cannot) squarely control appeals concerning state legislative apportionment. *Connor* v. *Williams, supra; Jackman* v. *Bodine, supra.*

Yet substantial questions do arise when considering any applicability of *Kirkpatrick* and *Wells* to state legislative districts as evidenced by the New Jersey Supreme Court turnabout in less than a two year period—a turnabout, it is suggested, due solely to an adherence to numbers. *Scrimminger* v. *Sherwin,* No. A-83, ... A.2d ..... (May 22, 1972).

The court below struck down mathematical deviations of the Virginia plan on the strength of *Kirkpatrick* and *Wells.* These cases, which follow logically from *Wesberry* v. *Sanders, supra,* are inapplicable to Fourteenth Amendment determination. Both the one-man, one-vote requirements in Congressional redistricting cases and the mathematical *exactness* requirements found in those cases have been derived from Article I, Section 2, of the Constitution of the United States. To hold that Fourteenth Amendment requirements now place upon the states the same principles

of exactness, ignores a fundamental concept of federalism.

The most succinct analysis of "the state governments and general governments, acting in *different and independent* capacities for the people" and insuring that "the general government might [not] easily be dissolved," II Elliot's Debates on the Federal Constitution (2d Ed. 1836), p. 367, was set forth by Mr. Justice Black in his opinion in *U.S.* v. *Arizona,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) as follows:

> The Framers of our Constitution provided in Art. I, § 2, that members of the House of Representatives should be elected by the people and that the voters for Representatives should have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Senators were originally to be elected by the state legislatures, but under the Seventeenth Amendment Senators are also elected by the people, and voters for Senators have the same qualifications of voters for Representatives. In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable. This was done in Art. I, § 4, of the Constitution which provides:
>
> > The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; *but the Congress may at any time by Law make or alter such Regulations,* except as to the Place of Choosing Senators. (Emphasis Supplied.)
>
> Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. See *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). In *United States* v. *Classic,* 313 U.S. 299 (1941), where the Court upheld congressional power to regulate the party primaries, Mr.

Justice Stone speaking for the Court construed the interrelation of these clauses of the Constitutional, stating:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." 313 U.S. at 315.

See also *Ex parte Siebold,* 100 U.S. 371 (1879); *Ex parte Yarbrough,* 110 U.S. 651 (1884); *Swafford* v. *Templeton,* 185 U.S. 487 (1902); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900).

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers "argued that the power given Congress in Art. I, § 4, was meant to be used to vindicate the people's right to equality of representation in the House." *Wesberry* v. *Sanders, supra,* and that Congress would "most probably . . . lay the state off into districts." And in *Colegrove* v. *Green,* 328 U.S. 549 (1946), no justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Surely no voter *qualification* was more important to the Framers than the *geographical qualification* em-

bodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotton boroughs" and Congress has in fact used its power to prevent States from electing all Congressmen at large.

* * *

In short, the Constitution alloted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them. A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws.

* * *

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. My major disagreement with my Brother Harlan is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine with the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. *Pope* v. *Williams*, 193 U.S. 621 (1904); *Minor* v. *Happersett*, 21 Wall. 162 (1874). Moreover, Art. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for

federal offices unless Congress directs otherwise under Art. I, § 4. It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-Four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-Fourth Amendments superfluous. My Brother Brennan's opinion, if carried to its logical conclusion, would, under the guise of insuring equal protection, blot out all state power, leaving the 50 states little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.

To require that the mathematical exactness requirements of congressional cases be applied to state redistricting is to exalt an abstract numerical variance into a constitutional command, a command that would nullify the right of a state to choose the legislative structure best suited to its needs; to have balance in a bicameral legislature; and to give an independent voice to the cities and counties it daily governs. Undeniably, "more flexibility . . . [*is*] constitutionally permissible with respect to state legislative appor-

tionment than in congressional districting." *Reynolds* v. *Sims, supra,* at 578.

II.

The Imprecise Creation Of A Multimember Senatorial Seat Was Without Any Constitutional Basis And Further Disrupted Valid Legislative Policy.

In 1964 this Court rejected an assertion that the Commonwealth could constitutionally justify underrepresentation allegedly resulting from the fact that the areas in question contained large numbers of military and military-related personnel. *Davis* v. *Mann, supra,* at 691. Subsequently in *Burns* v. *Richardson, supra,* this Court sustained as permissible the exclusion, not of all military personnel, but of those not meeting a State's residency requirements. In so doing the Court upheld, for state legislative districts, an apportionment base other than total population, i.e., a registered voter base, as long as the results reached would be substantially approximate to some other type of population-based scheme of apportionment such as an eligible voter, citizen, or total population based apportionment scheme.

Sustaining total population as a guide to apportionment of state legislative districts, this Court as to congressional redistricting "question[ed] whether distribution of congressional seats except according to total population can ever be permissible . . . ." *Kirkpatrick* v. *Priesler, supra.* Faced with these court decisions (especially the mandate of *Davis* v. *Mann, supra,* that military personnel must be included) and realizing the legislative responsibility of resolving "[m]any difficult questions of judgment, relating both to policy and to administrative convenience . . . in determining what statistics to use in establishing its apportionment plan,"

Burns v. *Richardson, supra* (Mr. Justice Harlans' concurring opinion at 99), the General Assembly of Virginia used a total population base. People, having substantial contact with the Commonwealth, be they citizen or not, voter or not, were the ones to whom representation was to be afforded. A census of total population is the broadest possible base, and in Virginia, it was the base approved by her recent Commission on Constitutional Revision, Commentaries, Article II, Section 6, p. 118, requiring "representation in proportion to the *population* of the district."

Policy considerations, constitutionally permissible, led the General Assembly to accept and the lower court to arbitrarily reject the following census enumeration.

> The Bureau of Census enumerated approximately 50,000 individuals at the United States Naval Station at Norfolk. It is imperative to remember that such enumeration was not from a sample survey, but from an actual count. Of these individuals approximately 14,000 were stationed physically on land at the base. There is no controversy as to those individuals. The remaining 36,693 were enumerated aboard the ship upon which they were stationed, such ships being "home ported" at the Naval station. The entire Naval station was placed in the Fifth Senatorial District. Since there were no geographical boundaries to the tract containing the enumeration of individuals on home-ported vessels such enumeration, as conceded by appellee Howell, could not be divided. Appellee maintains that though enumerated aboard vessels, many individuals lived elsewhere and that "18,000" of these "home-ported" naval personnel actually reside "for the most part in the City of Norfolk, but to a considerable degree *not* in the Fifth Senatorial District.

With this blithe statement a sample survey on the basis of zip codes alone was given greater priority than an

enumeration[13] of total population, which the General Assembly used to achieve percent variations of minus 0.1%, minus 0.02% and minus 0.2% respectively in enacting the Fifth, Sixth, and Seventh Senatorial Districts. The lower court, not indicating what survey data would be satisfactory, created the only multimember district in the Senate, thus effectively avoiding the General Assembly's policy determination. Further, neither the lower court nor appellee Howell showed whether the sailors in question were or were not citizens of the Commonwealth. Since the General Assembly used the constitutionally permissible base of total population for apportionment of the Senate districts, any assertion by appellee Howell that registered voters in each district did not approximate the population of such district "is insufficient to establish constitutional deficiency." *Burns* v. *Richardson, supra* at 94-5. Consequently no constitutional deficiency has

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[13] Appellants are aware of Mr. Justice Fortas' concurring remarks in *Kirkpatrick, supra* at 539, that:

> Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o'-the-wisp. The fact is that any solution to the apportionment and districting problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based.

However, if a "will-o'-the-wisp" approach was ever taken it was T. J. Reed's attempt in this litigation to turn a housing survey into a base for apportionment. (Reed was plaintiff Howell's statistician, and it was he who used a zip code survey to criticize the census enumeration.) His "carefully calculated" survey contained zip codes of post office boxes which he distributed at random; zip codes of streets running through all three senatorial districts, which he distributed at random; and zip codes of cities he did not even know should have been included in the survey. (A. pp. ....). Even assuming a degree of accuracy in Reed's survey, his results show that of the 21,600 who were enumerated as home-ported in the Fifth but lived outside such district, 48%, or over 9,500 persons, maintained residences outside the Fifth, Sixth, or even the Seventh Senatorial Districts.

been shown, nor was the General Assembly arbitrary in relying on the census enumeration.

The decision of the court enunciated an entirely novel principle, that of constitutional requirements without any decisional support. To urge that States may not rely upon the 1970 decennial census but must look behind such enumeration to determine where individuals "reside" in the technical legal sense of the word is unsound. Such a unique requirement is clearly not constitutionally mandated. The approach adopted also limits states and localities in choosing between single multimember legislative districts, necessitating adoption of the latter method of redistricting.

The Senate of Virginia as indicated apportioned itself into forty single-member districts, relying on enumeration figures of the United States Bureau of the Census. The District Court's finding, that the enumeration of Naval personnel was acceptable for Census purposes, but could only be used by Virginia to create a multimember district, requires the Commonwealth, if a legislative policy of single-member districts is to be implemented, to find where Naval personnel actually own or rent a home in the Commonwealth. This means also a determination of where: college students (counted at their school); institutionalized patients (counted at their institution); other military personnel (counted at their base); actually "reside,"—making proper compensation for necessary adjustments. Such a requirement is fraught with difficulties and possible challenges.

The Census in determining manner and methods of enumeration ignores the traditional meanings of domicile and residence and counts an individual not in those terms but where he "lives," i.e., the place to which such individual has the greatest nexus. Consequently, an individual who, for example, is in State Government in Richmond and lives in an apartment or hotel during the week and commutes

home every weekend to his family, home, and place where he votes, is enumerated in Richmond.

The Bureau of the Census decided that the nexus of Naval personnel would be to that place where they were home-ported, and consequently enumerated those individuals at such port. The lower court requires allocation of such individuals, not where the greatest nexus is but where they "reside" without any evidence whether they actually vote at such residence or can be found there a majority of the time.

Appellees in the Senate case did not advocate a different apportionment base be used by the Commonwealth of Virginia. What they did in fact attack was not single-member districts; not the apportionment base; not the use of census data; but the decision of the General Assembly of Virginia to accept the manner in which the United States Bureau of the Census enumerated Naval personnel.

2 U.S.C.A. § 2(a) requires that each fifth Congress be given a statement "showing the whole number of persons in each State" as ascertained by decennial census of the population.

> The phrase "whole number of persons" has been defined historically by the Bureau [of the Census] to include citizens and aliens, persons of voting age and those below voting age, persons who are entitled to vote and those who are not yet entitled to vote, as well as those who have lost the right to vote. *Borough of Bethel Park* v. *Stans,* 319 F.Supp. 971, 973 (W.D. Pa. 1970).

There can be no doubt that the Commonwealth of Virginia views her legislators as charged with representing the views of all those persons so described who are counted in the district. They are not viewed as representing only those who would be eligible to vote for them. Since the Census

enumerates the whole population, the General Assembly was proper in utilizing such data for its reapportionment base.

The latest challenge to the Census Bureau's manner of enumeration was contained in the case of *Borough of Bethel Park* v. *Stans, supra.* The case covers in a comprehensive manner not only the issue raised by plaintiffs regarding enumeration of Naval personnel but also the compatible issues which arise regarding enumeration of students at colleges and inmates at institutions, all of which are enumerated as residents of the places where their respective military installations, colleges and institutions are located. It is therefore, appropriate to quote the case at length:

> Turning to the procedure established by the Director whereby members of the Armed Services serving within the United States, college students and institutional inmates are enumerated as residents of the places where their respective military installations, colleges and institutions are located, the Court finds that this procedure has a rational basis and represents a proper exercise of discretion. The procedure for enumerating such persons is, in each instance, consistent with the governing principle of the Bureau that persons are to be enumerated at their usual place of residence at the time of the census, that place being the one in which they generally eat, sleep, and work, with persons who are temporarily absent for a few days or weeks from such usual place of being counted as residents of their usual place of abode. Thus, the aforementioned groups of persons are enumerated in the same manner as all other persons, including, for example, a professor who has accepted an appointment to teach at a college for one year but does not know where he will be employed the year thereafter or a businessman who has similarly accepted a one-year appointment at a given location.
>
> The Bureau has rejected as unsatisfactory criteria

for enumeration concepts of "domicile," and "legal residence." This is not without justification. Each of these terms connoting a legal status are susceptible of varied definitions in different States and also depending upon the purpose for which the terms are used. To utilize any of these terms susceptible of multiple definitions as criteria for enumeration would be to abandon a uniform standard for the same. Moreover, to determine the legal status of a given individual as a domiciliary or legal resident of a particular State and political subdivision within a State, the census takers would be required to inquire of individuals as to their own judgments as to whether they had acquired such a legal status. Many persons would not be in a position to answer satisfactorily such an inquiry.

The Bureau's governing principle is not without a rational basis. As a matter of the practical administration of the census, the Bureau has found that it can best avoid missing substantial numbers of persons altogether, on the one hand, and the extensive duplication of persons, on the other, by enumerating persons as of their actual place of residence at the time of the census.

Plaintiffs contend, however, that members of the Armed Services within the United States, college students, and inmates of institutions should be enumerated as of their home residences. Home residences, it is contended, could be ascertained from the records of the military installations, colleges and institutions. However, the testimony of Dr. Taeuber evidences that the Bureau has a rational basis for using a method of enumeration other than the one suggested by plaintiffs.

In the case of members of the Armed Forces stationed in the United States, difficulties are presented in enumerating them as of home residences. There are those young men living in their parental home until induction into the Armed Forces and it could be presumed that they will return to their parental home when discharged. There are indications, however, that service in the Armed Forces may lead persons to settle

in a different State on discharge. There are, similarly, young men who have left the parental home, who have married and started families. Presumably, they will return to their families, but frequently their service in the Armed Forces means a change of residence for their families, and it is by no means clear that they will return to their previous address. In addition, there are those young men who have left the parental home and who, prior to induction, are living in apartments or rooming houses. To assign them back to these living quarters, now occupied by someone else would raise the disturbing question as to who are the real residents of the living quarters. Finally, persons making a professional career of service in the Armed Forces may not have any real residence other than in the area in which they are serving.

Plaintiffs contend that those servicemen who have left addresses which are occupied by others on the date of the census at least could be counted back to the smallest political subdivision from whence they came. But, if one considers a serviceman who has left, for example, plaintiff-Borough of Bethel Park, the inaccuracy of such a designation is quite apparent. Bethel Park is a suburb within the metropolitan area of the City of Pittsburgh. If the serviceman's previous address in Bethel Park is occupied by another when he leaves the Armed Services, it is not unlikely, should he desire to return to his "home area," that he would seek residence, for example, in the City of Pittsburgh proper. If he did so, he would become a resident of a congressional district, State legislative districts, and political subdivision different from the ones in which he resided in Bethel Park.

To enumerate college students as of home residences has been found no less of a problem by the Bureau. When the Bureau followed a procedure of enumerating college students as residents of their parental homes, there was evidence that a number of college students were reported neither by their families nor by the col-

leges. Also, college students are a transitional group in the population, and many will not return to the addresses of their parents. Again, as in the case of servicemen, some will not return to their home States. Of those who will return to a home State and even a "home area" within that State there will be, nevertheless, many who acquire residences in congressional and State legislative districts and political subdivisions other than the ones in which they once resided.

Enumerating inmates of institutions as of home residences presents similar and other difficulties. As in the case of servicemen and college students, many will not return to the same address from whence they came. In the case of penal inmates, many have of record no prior address. Inmates of homes for the aged will assume permanent residences there.

In each of these cases, the persons in question draw upon the services of the communities in which their military installations, colleges and institutions are located. The communities in which these persons are to provide for all residents. No abuse of discretion is residing must plan and develop their public resources found in enumerating these persons as inhabitants of these communities rather than as residents of a presumptive home to which many may not be expected to return. Moreover, there is no reason why different criteria should be applied to these persons than are applied to the population at large, many of which may have a status which may be characterized as equally transient on the date of the census.

Plaintiffs also challenge the methods whereby the Bureau enumerates military servicemen and Government personnel abroad as residents of the States from whence they came and not as residents of any particular address or political subdivision within that State. Enumerating these persons as residents of particular addresses or political subdivisions, presents the same problems as previously discussed with regard to military servicemen stationed within the United

States and college students. Although military servicemen and Government personnel abroad may not even return to the State from whence they came, unlike military servicemen and Government personnel living within the United States, these persons cannot be enumerated as of any other State. There are presently a large number of members of the Armed Services abroad and the most feasible method of enumerating them as among the population of the United States is to count them back to the States wherein they were residents before entering the Armed Services.

Plaintiffs further challenge the failure of the bureau to enumerate as residents of either a State or home residence private citizens who are living and working abroad. The short of the matter is that the Bureau has no means of locating these people.

On review of the various methods of enumeration challenged here, the Court finds that plaintiffs have failed to establish that these methods are without rational basis. The mere fact that an alternative method of enumeration may exist does not lead to the conclusion that the method employed is arbitrary or any less within the discretion of the Bureau. Nor does the fact that the Bureau has not conducted a statistical survey to determine how many servicemen, college students and institutional inmates in fact return to home States, political subdivisions or addresses compel the conclusion that the methods employed are without rational basis.

The decisions of the census regarding manner of enumeration have been sustained in numerous attacks, one of the earliest being *United States ex rel Atlanta, Georgia* v. *Steuart*, 47 F.2d 979 (D.C. Cir. 1931), continuing with *Duesing* v. *Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Watson* v. *Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968); *Udall* v. *Washington, Virginia and Maryland Coach Co., Inc.*, 398 F.2d 765 (D.C.

Cir. 1968); *Warren Bank* v. *Camp*, 396 F.2d 52 (6th Cir. 1968); and *Quon* v. *Stans*, 309 F.Supp. 604 (N.D. Cal. 1970).

Not only has the manner of enumeration of the Census been upheld, the census as a base measurement of total population and a proper base for reapportionment has never been declared improper. *Kirkpatrick* v. *Preisler, supra; Burns* v. *Richardson, supra; Davis* v. *Mann, supra; Reynolds* v. *Sims, supra; Wesberry* v. *Sanders, supra,* and more recently, *Chavis* v. *Whitcomb, supra, rev'd on other grounds,* where the three-judge court determined that even in the year 1969 the proper basis for reapportionment would be the 1960 decennial census.

It is submitted that total population is a constitutionally permissible base, *per se*. See *Preisler* v. *Mayor of St. Louis*, 303 F.Supp. 1071 (E.D. Mo. 1969). The reason for the conclusion being constitutional was aptly stated in *Preisler:*

> It cannot be contended seriously that elected officials represent only registered voters. The right to equal representation does not depend upon the extent of a person's political activity or his exercise of political rights.

That the policy of the Commonwealth, in redistricting, is to consider total population, is amply supported. See Article II, Section 6, and Article VII, Section 5, of the Constitution of Virginia; § 15.1-788 of the Code of Virginia (1950) as amended (Chapter 201, 1971 Acts of Assembly) and § 15.1-571, Code of Virginia (1950), as amended (Chapter 200, 1971 Acts of Assembly). Additionally, Chapter 199 of the 1971 Acts of Assembly, enacting § 15.1-37.5, specifically requires that in redistricting of counties, cities and towns wherein members of the governing body are elected from wards:

> . . . the governing body of a county, city, or town shall use population figures of the most recent decennial United States census for such county, city, or town.

What better measure of population could there be than the Census? Simply stated, it cannot be contended, in view of the cited authority and general principles of reasonableness, that the Commonwealth of Virginia was arbitrary in relying upon the manner of enumeration used by the Census Bureau in the count of Naval personnel.

Plaintiffs and the District Court would have the Senate of Virginia redistrict "on a rule of thumb" that approximately fifty percent (50%) of the Naval personnel enumerated in Census Tract 000999 occupy housing elsewhere than the Fifth Senatorial District in which they were enumerated.

First, it must be emphasized that the census count is not a sample but a total count. It is clear from the evidence and undisputed by plaintiffs that Census Tract 000999, the Norfolk Naval Base, could not be divided. It was necesssary to place all Naval personnel in that one census tract. Any other manner of allocation adopted by the Commonwealth of Virginia would have involved revision of the numerous decisions made by the Bureau of Census regarding manner and methods of enumeration and would have led to a morass of litigation. The action of the Virginia General Assembly in adopting the census violated no constitutional rights. As indicated time and time again, the legislature of Virginia represents not voters, it represents all resident individuals. Those individuals enumerated in the census tracts are fully represented and require the representation that any other individual needs regarding urban services such as schools, police and fire protection, streets and highways, and mass transportation.

That these military people had to be counted, as indicated, is undisputed. The manner of counting them, i.e., reliance upon the census, in no way constitutes an invidious discrimination nor denies equal representation to any individual. To require that the City of Norfolk be the only locality in the Commonwealth of Virginia to have a multi-member senatorial district was not only an invasion by the judiciary of the General Assembly's perrogative, but further resulted in a destruction of the balance struck between the Houses in Virginia's bicameral legislature.

The Senate, though single member districting the entire State necessitated some fragmentation, was careful to insure that any political subdivision that was fragmented would nonetheless have an effective voice in the legislative district. Though a portion of Virginia Beach was fragmented, it did have 40,195 of its population combined with 75,764 of Norfolk for a single senatorial district of 115,959, —a minus 0.2% deviation. Now, however, with the Court abolishing the single member districts in Norfolk, the 40,195 individuals are combined with the entire City of Norfolk (307,951).

In short, the General Assembly in relying upon the figures of the Bureau of the Census adopted its method of enumeration. Representation of individuals would be on a total population base, with persons, whether citizens of Virginia or not, receiving such representation at the place determined by the Census to be that at which they had the greatest nexus, the place where their daily lives would be most affected by legislative enactments. If the allocation of Naval personnel was proper for census purposes, it was clearly proper for redistricting purposes. If the concept of "live" used by the Census must be rejected then, prior to any re-

districting, each State legislature must determine "residence" not only of Naval personnel, but all military personnel, college students, and institutionalized inmates at hospitals, prisons, and mental institutions. The concept of one-man, one-vote imposes no such requirement.

The other grounds of attack raised by appellee Howell in the lower court but not fully pursued were that (1) single member districts discriminated against Negroes and (2) that it was a violation of the equal protection clause to have the entire naval base within one district since federal law did not permit campaigning thereon. As to the former, the districts as drawn by the General Assembly neither fenced out blacks, *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, (1960), nor fenced them in, *Wright* v. *Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). Additionally, such districts received the approval of the Attorney General when reviewed pursuant to Section 5 of the Voting Rights Act of 1965. (J.A. pp. 51, 54). As to the latter, nowhere in the Constitution is it known to Appellants that a candidate has an unlimited right of campaign activity on governmentally owned property.

III.

The Requirement Of The District Court That Elections Be Conducted Only From Districts Mandated By Court Order, Runs Afoul Of Every Decision Of This Court Which Recognizes The Doctrine Of Federalism And Separation Of Powers.

Footnote 4 of *Connor* v. *Bell,* 40 U.S. L.W. 3348 (U.S. Jan. 24, 1972) (mem.) emphasizes what has been taken for granted by this Court and most lower courts since the "political thicket" was entered. The Court stated:

> . . . During the course of this litigation, the District Court has emphasized that "the exercise of this unavoidable judicial duty [drafting and apportionment

> plan] cannot, does not, and will not in any way tie the hands of the Legislature at any time to adopt and enact any plan of its own for the reapportionment of its membership so long as it complies with Constitutional requirements." *Connor* v. *Johnson,* 265 F.Supp. 492, 494, (S.D. Miss. 1967) (emphasis in original). This Court has frequently emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964). See also *Burns* v. *Richardson,* 384 U.S. 73, 85 (1966); *Ely* v. *Klahr,* 403 U.S. 108, 114, n. 6 (1971).

In stark contrast, the unprecedented Order of the court below (J.A. p. 24) requires that:

> 2. . . . members of the Senate and of the House of Delegates of the General Assembly of Virginia be elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;
>
> 3. . . . Such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid;

The lower court, moreover, cannot seek any refuge in an assertion that court order redistricting was an "unavoidable judicial duty." The Virginia General Assembly convened in Extra Session in January of 1971 and adopted a plan of

redistricting for its State Senate and House of Delegates, applicable to the 1971 general elections thereby insuring representative participation in the election of its members at the earliest possible moment in the decade of the Seventies.

The Assembly then *recessed* in lieu of adjournment while the plans were presented to the Attorney General pursuant to the Voting Rights Act of 1965, see *Perkins* v. *Mathews,* 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971), and while awaiting the lower court's ruling on constitutional issues raised by the instant suits. The Attorney General interposed certain objections to the plans and as a result the court postponed, on its own motion, any rulings; the Attorney General then withdrew his objections in light of *Chavis* and the court on June 16, 1971, heard the constitutional issues raised; its Order of May 24, 1971, being complied with when all objections raised by the Attorney General as to House districts had been appropriately withdrawn and the Senate plan amended.

Then on June 2, 1971, the lower court entered its Order, making it perfectly clear that the General Assembly need not have waited patiently in recess to correct any constitutional error decreed by the Court; all elections for the General Assembly were to be held from the districts described in the opinion. These matters of "legislative consideration and determination", *Reynolds* v. *Sims, supra,* having been judicially decreed, the General Assembly adjourned on July 19, 1971, with the mandate that an appeal be made to this Court requesting correction of the flagrant abuses of judicial discretion constituted by the district court's action. The Commonwealth's position is that though judicial *determination* of constitutional limitations in redistricting is proper, judicial relief must be restrained.

As stated in *Burns* v. *Richardson, supra:*

> Our decision in *Reynolds* v. *Sims* emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion *after having had an adequate opportunity to do so.*" 377 U.S., at 586, 12 L.Ed.2d at 541. Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond a clear command of the Equal Protection Clause. (Emphasis added.)

In the case at bar, the lower court exceeded even the limited restraints placed upon the State of Hawaii in the *Burns* case and mandated that the General Assembly should redistrict no further and that all elections for members of the General Assembly would be held only under those districts devised by the Court.

The district court in Virginia's case abandoned its role of rendering judicial determinations and, without consideration of the propriety of such action, invaded the legislative field, allowed the legislature no opportunity to react to its judicial determination, and ordered into effect its own reapportionment plan. Indeed, though the court in *Reynolds* v. *Sims* ordered into effect a redistricting plan of its own, it did so only as this Court recognized:

> Additionally, the Court below acted with proper judicial restraint, *after the Alabama Legislature had failed to act effectively* in remedying the constitutional deficiencies in the State's legislative apportionment scheme, . . . in prescribing a plan admittedly provisional in purpose so as not to usurp *the primary responsibility for reapportionment which rests with the legislature.* (Emphasis added.)

Even in the previous Virginia reapportionment case of the Sixties, *Davis* v. *Mann, supra,* this Court made clear that legislative reapportionment must be done by the General Assembly, stating:

> *After* the District Court has provided the Virginia legislature with an *adequate opportunity* to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. . . . The court below [could] take further action should the Virginia legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan.

The ruling of this Court in the case of *Ely* v. *Klahr, supra,* commended and upheld the action of the District Court for the State of Arizona in refraining from interfering with the Arizona legislative plan even though the feared result was that an election would be held under a plan found unconstitutional by the Court. This Court noted and reconfirmed its earlier ruling in *Reynolds* v. *Sims* that:

> Districting and apportionment are legislative tasks in the first instance, and the Court did not err *in giving the legislature a reasonable time to act* based on the 1970 census figures which the Court felt would be available in the summer of 1971.

Because of varied aspersions upon the Commonwealth, in attempts to relive history and ignore the issue before the Court, it is necessary to point out: that past history of Virginia did not require an "understanding" test (requiring applicants to demonstrate their ability to read and explain provisions of, usually, a state Constitution) (see Debates, Const. Conv. 2937-40, 3076-77 (1901-02) where such a proposal was rejected); that literacy test requirements

(apply to register in one's own handwriting) were never found to be administered discriminatorily (See 1961 Report Civil Rights Commission, Vol. I, pp. 22, 102); that poll tax requirements were never administered or struck down as discriminatory, see *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); and that allegations of recalcitrance in the reapportionment area are simply unfounded. Reapportionment history in the Commonwealth lends no substance to fears that elections would be held under unconstitutional plans. *Ely* v. *Klahr, supra.* A comparison of redistricting in the Commonwealth with the recent decision of *Sims* v. *Amos,* 340 F.Supp. 691, (M.D. Ala. 1972) substantiates that any such claims are unfounded.

A cursory reading of the *Sims* decision points to the dichotomy between a judicial decision of constitutional issues and the anomalous decision in the instant suit constituting an unwarranted flex of judicial muscle. The entire opinion of the Virginia District Court is summed up in their last statement. The courts' decision does not "judicially" opine but simply "legislatively" redraws districts with the blithe announcement that their apportionment "is the best [they] can devise."

Virginia's is not a case arising, as was *Sims,* from a legislature's lack of adherence to the command of its own state constitution. It is not a case arising, as was *Sims,* from a seventh decade of inaction in the legislative reapportionment field. In fact Virginia has continuously redistricted decennially and by faithfully following the mandate of her Constitution ranked eighth in the United States in fairness of representation based solely upon population, prior to 1961 when the major reapportionment decisions were rendered by this Court. *Davis* v. *Mann, supra.*

The district court in *Sims* v. *Amos,* studiously set forth the history of Alabama redistricting in order to justify its intervention into a legislative responsibility. It emphasized:

> This Court always has recognized that the primary responsibility for reapportionment rests with the Legislature and that no action on the part of this Court, which is not absolutely essential for the protection of plaintiff's constitutional rights, should be taken before the Legislature of Alabama has had a reasonable opportunity to comply with its duty. *Sims* v. *Frink,* 208 F.Supp. 431 (M.D. Ala. 1962). Indeed, the history of the present litigation reflects a trend of protracted judicial restraint, this Court acting only when confronted with totally inadequate legislative responses to, or complete disregard by the Legislature for, its constitutional mandate. The following is a cursory survey of that history.

The court then proceeded to outline the legislative responses to redistricting orders, and *only then,* by showing the inadequacy of such response, did it deem its own plan, which was drawn by the plaintiffs and upon which defendants had ample opportunity to comment. The justified protracted judicial restraint of the Alabama district court stands in stark contrast to the actions of the lower court in this litigation.

Faced with no defense but only with a concession as to malapportionment, the district court in *Sims* v. *Amos,* rejected Alabama's request that, given more time, that state would effect the required reapportionment. It is appropriate that the reasons for such rejection be set forth herein at length.

> Although the Constitution of Alabama required the Legislature to reapportion in accordance with the latest available federal census, prior to the initiation of the present litigation in 1961, *Sims* v. *Frink,* the last time

the Legislature had reapportioned was in 1901. Sixty years and six decennial federal enumerations of the population of Alabama had passed without the Legislature having adhered to the command of its own State's Constitution. Nevertheless, in 1962, when plaintiffs in *Sims* sought an interlocutory injunction prohibiting defendants from holding primary elections in the malapportioned districts, this Court acknowledged the primacy of the Legislature's role in reapportionment and, although it retained jurisdiction, refused to issue the injunction, stating "[t]here [still] is time [before the general election] for the Legislature of Alabama to comply with its duty. . . ." But having been afforded this additional reasonable opportunity to provide a fair and proper reapportionment, the Alabama Legislature again failed to remedy the "invidious discrimination" ingrained in the apportionment of the State's legislative districts. At that time this Court would have been justified in instituting a complete reapportionment plan of its own. Instead, however, recognizing the delicate relationship between federal courts and state legislatures, this Court effected only the minimum changes considered necessary to release the "stranglehold" on the Legislature and to permit it to reapportion itself in time to conduct the 1966 election of Alabama legislators. In this connection it was observed:

> The Court hopes that the moderate steps taken by this order may be enough to break the stranglehold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the stranglehold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case.
>
> 208 F.Supp. at 442.

Again jurisdiction of the case was expressly retained, and after the United States Supreme Court, in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), affirmed this Court's action, it remanded the case for further proceedings, specifically directing this Court "to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim . . . ," that is, in time to be used as the basis for conducting the 1966 election of State legislators. Subsequent to that decision, and because the Legislature again had failed to reapportion itself, this Court, in July of 1965, ordered the parties in *Sims* to file "their proposals for a judicial remedy designed to eliminate the 'invidious discrimination' presently existing in both Houses of the Legislature. . . ." Thereafter, the Alabama Legislature convened in special session and enacted bills to reapportion both the Senate and the House of Representatives. This Court accorded each of those acts "the most careful scrutiny and consideration," focusing on the constitutional prerequisite that reapportionment must be substantially on a population basis. *Reynolds* v. *Sims,* 377 U.S. at 568; Alabama Const. art. 5, § 200 (1901). In its decision, filed on October 2, 1965, this Court adopted the multi-member district senatorial scheme of the Legislature, but, because it found the Legislature's House plan discriminatory against Negroes, it provided an alternative plan of multi-member House of Representative districts. *Sims* v. *Baggett, supra.* This Court retained jurisdiction and order that:

> . . . the apportionment of the Alabama Legislature as herein ordered remained in effect without change, except by order of this Court, until the Legislature of the State of Alabama reapportions itself . . . after the next decennial census to be conducted in 1970. . . . [Unpublished decree.]

The next chapter in the development of the present litigation began in January of 1970, when certain

"Negro-Americans" residing in the "predominantly Negro ghetto areas" of Montgomery, Mobile and Jefferson Counties filed a class action seeking preliminary and permanent injunctions against the election of State legislators from these three counties on a county-at-large basis. Plaintiffs contended that multi-member districting operated to minimize and cancel out their voting strength to the extent that they were deprived of equal protection of the laws and of the rights guaranteed them by the Fifteenth Amendment to the United States Constitution. Although this Court refused to issue a preliminary injuncion because "it would be unreasonable and unwise to require any legislative reapportionment prior to the time fixed in [*Sims* v. *Baggett*], that is prior to the first legislative session following the completion of the 1970 decennial census," this Court did order that jurisdiction be retained, that a hearing on the merits be postponed and that defendants' motions to be dismissed be denied. In so ordering, the Court commented upon the merits of plaintiffs' complaint:

> . . . In our opinion, however, the evo evidence offered in support of the plaintiffs' claim, if such evidence is substantiated by the 1970 decennial census and by the further evidence then available, makes out a strong case for the consideration of the Legislature of Alabama.

Nixon v. *Brewer*, 49 F.R.D. 122, 126 (M.D. Ala. 1970).

Following this order and the ensuing completion of the 1970 census, several events occurred in rapid succession. First, in June of 1971, plaintiff Peters filed a class action in the Northern District of Alabama, asking that the State Legislature be reapportioned and that mid-term elections be held. On July 12, plaintiffs in *Nixon* and *Sims* filed a motion for consolidation and asked for relief similar to that requested in *Peters*.

Ten days later this Court granted the motion to consolidate and issued an order requiring defendants to show cause why the Legislature was not under a mandatory constitutional duty to reapportion and if the Legislature should fail to perform its duty, why this Court would not then be under a duty to reapportion the Legislature constitutionally. On Septmber 20, 1971, *Peters* was consolidated with *Sims* and *Nixon*.

Despite this Court's observation in *Nixon* v. *Brewer* that plaintiffs' complaint made out a strong case, despite the 1970 census' clearly substantiating plaintiffs' claims, and despite the events set out above, the 1971 General Session of the Alabama Legislature adjourned without having met the mandates of both the Alabama and Federal Constitution concerning reapportionment. On October 8, 1971, this Court set these three cases for hearing to commence December 2, 1971, and expressly notified the Legislature that it had until that date to enact a plan. Although the Legislature has convened since in special session, it has continued to fail to discharge its duty. With the *Nixon* plaintiffs' amendment of November 22, 1971, which added to the prayer for relief a request for statewide single-member legislative districts, this litigation assumed its present posture. The Court proceeds, therefore, to the merits.

In contrast to the above Virginia has, as an example, faithfully and consistently redistricted in Congressional (Acts of Assembly 1891-92, p. 348; 1906, p. 40; 1912, p. 156; 1932, p. 20; 1934, p. 17; 1948, p. 802; 1952, c. 282; 1958, c. 333; 1964, c. 536; 1971, c. 118), Senatorial (1891-92, p. 56; 1901-2, p. 800; 1922, p. 463; 1934, p. 252; 1942 c. 387; 1952, c. 17; Ex. Sess. 1958, c. 333; 1962, c. 635; 1964 Ex Sess. c. 1; 1971, cc. 120, 246), and House of Delegates legislative seats (1891-92, p. 56; 1901-2, p. 800; 1922, p. 463; 1932, p. 337; 1942, c. 387; 1952, Ex. Sess.,

c. 18; 1958, c. 333; 1962, c. 638; 1964, Ex. Sess. c. 2; 1971, c. 116).[14]

The original redistricting litigation, instituted in the Commonwealth, *Mann* v. *Davis,* 213 F.Supp. 577 (E.D. Va. 1962), following the 1960 census was brought to test the validity of the then recently passed redistricting acts (1962 Acts of Assembly cc. 635, 638), not to cure inaction. Upon this Court's decision in *Davis* v. *Mann, supra,* the General Assembly of Virginia immediately in extra session (1964 Acts of Assembly Ex. Sess. cc. 1, 2) passed new redistricting acts, varying significantly from the minimal changes of the 1962 acts, which 1964 acts were approved by this Court. *Mann* v. *Davis,* 245 F.Supp. 241 (E.D. Va. 1965), *aff'd,* 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965). The federal district courts in Virginia have never been confronted, as was the Alabama district court in 1966, with no alternative except to design a judicial remedy. And even in 1966, the Alabama court, faced with such a dilemma, requested and sought proposals for redistricting.

In 1971, the instant suit, as in 1963, was brought to test the validity of the new redistricting, not as in Alabama, to prohibit malapportionment due to inaction. As previously indicated the 1971 Acts were purposely passed to achieve proper representation for the greatest length of time possible in the decade of the seventies. Further the General Assembly at its 1971 session never adjourned but recessed until the validity of its reapportionment acts could be fully tested. The one admonition given by the District Court—to cor-

[14] Though some may argue that the General Assembly was not consistent, since it adjourned in 1952 without redistricting, (it did enact a congressional plan) the mandate of the Commonwealth's Constitution was nevertheless met through the executive branch, convening a special session wherein the legislature, not the judicial branches of government, adopted a reapportionment scheme for House of Delegate and Senatorial legislative seats.

rect the objections the Attorney General interposed under the Voting Rights Act of 1965, 42 U.S.C. 1973, *et seq.*— was quickly met when a line dividing Senate Districts Five and Six was redrawn and the Attorney General's sole objection to the Senate plan withdrawn.

The arguments by some that the General Assembly should have cured all complaints fail to realize that redistricting cannot please all political elements and individuals of a state. Divergent complaints, impossible to reconcile, were heard from many quarters such as the DuVal request for single member districts and the Parris request for one multimember district for the same area. The General Assembly was, therefore, more than justified in following the order of the lower court with regard to mooting the objections to the Attorney General and in awaiting the decision of such court as to the constitutional issues raised by appellees. It is regretful that such a wait was for naught and that the district court never informed the General Assembly in what manner, if any, the legislative redistricting acts were constitutionally deficient, but merely announced its own restructuring.

The lower court in fact never really ruled upon the constitutional issues presented, but looked upon the whole litigation as culminating in "judicial" reapportionment. The necessity of providing "the Virginia Legislature with an adequate opportunity to enact a valid plan," as mandated by this Court in *Davis* v. *Mann, supra,* was ignored. Clearly, the absence in Virginia, of the justification as outlined in *Sims* v. *Amos, supra,* emphasizes the error of the district court, and requires reversal.

IV.

The Voting Rights Act Allegations Raised In The Thornton Appeal, Coupled With Allegations Of Fourteenth Amendment Denial, Are Without Merit.

Undaunted by previous failure, the black plaintiff intervenors seek, in what is considered the "second round" of reapportionment litigation. (see R. Dixon, *Democratic Representation, supra*), exactly what this Court previously rejected in the "first round" of reapportionment litigation. *Thornton* v. *Davis,* 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965).[15] Black appellants understand *Whitcomb* v. *Chavis, supra.* They are demonstrably unable to show that the multimember district of the City of Richmond or similar districts throughout the Commonwealth, "were conceived or operated as purposeful devices to further racial or economic discrimination."

Virginia's House of Delegates has maintained a tradition, sanctioned by this Court, of not obliterating the traditional integrity of city and county lines. *Davis* v. *Mann, supra; Mann* v. *Davis, supra.* Nor can it be alleged that, as to the city of Richmond, the multimember district, which encompasses the newly annexed area, was manipulated to cancel out the voting strength of Richmond's blacks. Such multimember district received the approval of the Attorney General; a multimember district for the same city was, as indicated, previously upheld; the city has consistently had multimember House seats; and the new annexation itself

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[15] Despite footnote 22 in *Whitcomb* v. *Chavis, supra,* this Court has had before it on appeal the objections (that the multimember district then created for the City of Richmond deprived Negro citizens of a chance to elect one of their race to the General Assembly) were rejected by the lower court and such lower court's action summarily affirmed by this Court. See, *Mann* v. *Davis,* 245 F.Supp. 241 (E.D. Va. 1965), *aff'd sub. nom.,* 382 U.S. 42 (1965).

"firmly rested on non-racial grounds." *Holt* v. *City of Richmond,* ..... F.2d ..... (Nos. 71-2185-86) (4th Cir. 1972), *cert. denied,* ..... U.S. ..... (June 26, 1972). No violation of any Fifteenth Amendment right was worked by annexation.

What, therefore, do black appellants have left by way of Fourteenth Amendment claims? They allege, and thus concede in the same breath, that these claims may have validity only if the burden of proof is on the Commonwealth to demonstrate that multimember districts do not invidiously discriminate. In other words, black appellants admit that they themselves are unable to prove discrimination.

The only basis for contending that Virginia is different from her sister State of Indiana is that Virginia is subject to the Voting Rights Act, 42 U.S.C. § 1973(c). Any reply that the Commonwealth has complied with the provisions of the Act is met with the assertions that the Attorney General of the United States erred in withdrawing his objection and that, in any event, since there has been discrimination in the past, Virginia should prove the absence of discrimination in the present. The first proposition is based on a faulty reading of the Act. Unless this Court believes that its role is not merely the effectuation of constitutional command, but the expiation of sin, it must also reject the second.

The thrust of black appellants' argument is now, as it was in 1965, that they are entitled to guaranteed election of their "own" representatives, through mandatory single-member districts. Statistics were introduced showing the proportions of black population in various localities, and unsuccessful black candidacies in such localities, as if this showing, constituted a prima facie case that the Commonwealth's apportionment should be upset. This Court held a similar contention to be without merit in *Whitcomb* v.

Chavis, supra, when it succinctly stated the age-old truth that is the very foundation of democracy: one candidate wins and the others lose. Hopefully the most qualified candidate is the successful one, but regardless of qualification the candidate who represents the wishes of the *majority* of his electorate is elected. Anything less would be less than a democracy.

Whether a particular result was reaffirmed by racial prejudice on the part of the voters may be argued but will never be known. The democratic process of majority rule and secret ballot necessarily permits expansion of varying motivations from the admirable to the despicable. Black appellants urge a change in the rules governing this process. This Court has stated quite clearly in *Whitcomb* v. *Chavis, supra,* that no reading of the Constitution can permit the absolute guarantee of political victory to any group. The Voting Rights Act being applicate to election *practices,* not election *principles,* this precept is just as valid in states covered by the Act as it is in the rest of the nation.

The position of black appellants regarding single-member districts that the failure of the General Assembly to partition the city of Richmond and other cities with significant black population into subdistricts of substantially equal population abridges rights secured to them by the Fourteenth Amendment to the Constitution of the United States. In considering the "subdistricting" aspect of black appellants' position, it must be stressed at the outset that their argument is founded exclusively upon *race.* The *racial* composition of the inhabitants of one or more of the subdistricts which it is alleged would result from such partitioning is the reason which must be nakedly advanced as the sole basis for their contention. Black appellants argue that the failure of the General Assembly and the lower court to

partition the cities of Richmond, Norfolk, Hampton, Newport News and Portsmouth results in a dilution of the voting effectiveness of Negroes who might reside in such subdistricts.

Initially, it should be emphasized that this assertion of black appellants constitutes a *non sequitur*. As citizens of multimember house districts entitled to vote for delegates, Negroes in, for example, the city of Richmond, have a voice in the selection of nine members of the General Assembly of Virginia including three single-member senatorial seats. This voice is substantial, effective and frequently decisive. If the General Assembly were to partition the city of Richmond into subdistricts—in the manner hypothesized by appellants—that voice would effectively be stilled in the selection of most of the representatives under consideration. If the General Assembly had partioned the city of Richmond into subdistricts, it would have been equally arguable by other black plaintiff-intervenors that the General Assembly "ghettoized" them into districts which would have substantially diluted the effectiveness of their votes. See *Wright* v. *Rockefeller, supra.*

Moreover, if the Constitution of the United States requires that multimember districts of cities containing substantial black population be partitioned into component subdistricts of substantially equal population for the purpose of representation in the General Assembly of Virginia, why does not the same Constitution equally require subdistricting of all other multimember house districts? Manifestly, counsel for black appellants do not argue that the Constitution imposes the latter requirements. Such an assertion would be tantamount to the proposition that multimember districts are *per se* unconstitutional. This contention runs squarely counter to this Court's express approval of such districts in

Reynolds v. *Sims, supra; Fortson* v. *Dorsey, supra;* and *Whitcomb* v. *Chavis, supra.*

Rather, counsel for appellants contend that the Constitution requires partitioning of a multimember district *only* in those instances in which such partitioning might give rise to a district in which Negroes will predominate and Negroes would then be able to elect a representative of their own.

Thus race alone, *i.e.,* the *racial* composition of the inhabitants of a resulting subdistrict, is the openly acknowledged foundation upon which the asserted constitutional principle is constructed. Absent the possibility of the formation of such a *racial* subdivision, the principle for which black appellants contend would have no application.

It is inconceivable to counsel for the Commonwealth that this Court would lend its imprimatur to an essentially racist constitutional rule. Certainly it declined to do so in affirming the following dispositive declaration of the district court in *Mann* v. *Davis, supra:*

> *Neither Richmond, nor any other city or county in Virginia has in her history ever been sub-districted. Even councilmen for the local government of Richmond are elected at large, and this without question by either race.*
>
> The concept of "one person, one vote" we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.
>
> As Justice Douglas, though in dissent but obviously undeniably, tartly put it in Wright v. Rockefeller, 376 U.S. 52, 62, 66 (1964):
>
> > *"The fact that Negro political leaders find advantage in this nearly solid Negro* and Puerto Rican *district is irrelevant to our problem.* Rotten boroughs

were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."

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". . . The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . .Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines. . . ." (Italics supplied.)

Let it also be clear what the black appellants' assertion is as to the withdrawal, by the Attorney General, of his objection to multimember districts previously interposed. Their true complaint is that they disagree with the Attorney General and do not relish being in a lawsuit where they have to prove their allegations. Black appellants' position is simply not supported by the plain language and intent of the Voting Rights Act. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 84 Stat. 315, 42 U.S.C. § 1973(c), first provides that a state, upon proposing an alteration of voting procedures such as involved in reapportionment, may institute an action for declaratory judgment in the United States District Court for the District of Columbia. The statute then reads:

. . . Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and

> the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . .

As this Court's very language in *Allen* v. *State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), points out:

> The provision for submission to the Attorney General merely gives the covered State *a rapid method* of rendering a new state election law enforceable. Once the State has successfully complied with the § 5 approval requirements, *private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by* § 5. (Emphasis added.)

Once Virginia has complied with all laws in submitting her redistricting plans to the Attorney General of the United States and, having met the burdens imposed by the Voting Rights Act, she is entitled to stand equal with other sovereign states. A private party, in a "traditional suit" has the "traditional" burden, reaffirmed in *Whitcomb* v. *Chavis, supra,* of proving his allegations. This requirement, black appellants concede, they have failed to meet. They have demonstrated no more than a "euphemism for political defeat" as in the Indiana case.

The assertion that the Attorney General acted improperly in withdrawing his objections to Virginia's apportionment plans after this Court's decision in *Whitcomb* v. *Chavis, supra,* is not properly made. Although black appellants ignore the Attorney General's letter of objection, it cannot

be denied that the original (and sole) reason for the objection to the multimember districts in five cities was the lower court's decision in *Chavis* v. *Whitcomb, supra.* When that decision was reversed by this Court, the authority on which the objections were based no longer existed, and the Attorney General would have been arbitrary indeed if he had continued to rely on his original letter. Black appellants maintain, however, that this Court's action in *Whitcomb* v. *Chavis, supra,* did nothing to change the basic principle that multimember districts are unconstitutional where they dilute minority votes, *cf. Fortson* v. *Dorsey, supra, Burns* v. *Richardson, supra,* and that the Attorney General should have continued his objections on these grounds.

In making this assertion, black appellants both misapply the cases and misconstrue the Attorney General's role. *Fortson* and *Burns* were Fourteenth Amendment cases, not Voting Rights Act cases, which stand for the proposition that multimember districts may not be utilized if they are *proved* to result in invidious discrimination. The burden of proof of such results does not shift in a Fourteenth Amendment "one-man, one-vote" case merely because it involves a Voting Rights Act state. The Commonwealth complied with all requirements established by the Act in making the submission to the Attorney General. The manner in which the Attorney General construes applicable law has no bearing on whether the Commonwealth fully discharged her legal obligation; she clearly did so. The Voting Rights Act provides no "appeal" from the Attorney General and a covered state, which properly submits new procedures, cannot be penalized because the Attorney General reaches one conclusion rather than another or, as in the case of *State Board of Election Comm's* v. *Evers,* 327 F.Supp. 640 (S.D. Miss. 1971), *appeal dismissed,* 92 S.Ct. 1281 (1972), no decision at all.

As Mr. Justice Blackman, joined by Mr. Justice Rehnquist, stated in the *Evers* case, commenting on the district court's holding that a state must do more than merely make a submission:

> I am unable so to read § 5 of the Voting Rights Act of 1965, and I cannot subscribe to the District Court's reasoning. Section 5, it seems to me, plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, (and the Attorney General has not interposed an objection within sixty days after such submission), as he did not, the proposed statutory changes may be enforced without the court proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days, I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in Perkins v. Matthews, 400 U.S. 379, 385 (1971), which supports a contrary conclusion. In my view the District Court's holding, when it equated nonaction by the Attorney General with the interposition by him of an objection is without foundation in the statute.

If this Court feels black appellants are correct in their contention that the Attorney General erred in withdrawing his objection, they must nonetheless reject such assertion since the Attorney General never interposed a *timely* objection. The submission of Virginia's reapportionment legislation was initially made on March 1, 1971, and, pursuant to a request received on March 18th additional material

was forwarded on March 22nd. The objection of the Attorney General was received on May 7, 1971, more than sixty days from the date of the initial submission. The position of the Attorney General was that the sixty-day period did not commence until the additional requested material was received.

With the promulgation on September 10, 1971, of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. §§ 51.1, *et seq.*, and the adoption of § 51.18, the Attorney General has attempted to make his position sustainable. It clearly was not in May of 1971, prior to the existence of such procedure, when sixty days indisputably meant sixty days. As held by the district court in *Vinik* v. *Smyth,* ..... F.Supp. ..... (No. 7189) (D. Ariz. 1971), in considering new regulations:

> . . . Those guidelines purport to define what constitutes a "submission" for the purpose of commencing the 60 day period and to give the Attorney General of the United States the authority to extend the time if the "submission" is considered insufficient by the guidelines as interpreted by the Attorney General.
>
> The effect of the guidelines is to make indefinite and uncertain the language and meaning of a statute which is relatively clear.
>
> * * *
>
> It would appear that the Congressional intent behind § 5 of the Voting Rights Act of 1965, as amended, was to provide for the early resolution of questions related to the validity of revisions of election laws of the several states and the political subdivisions thereof. In *Allen* v. *State Board of Elections, supra,* the Court stated (393 U.S. 549),
>
> > "The provision for submission to the Attorney General merely gives the covered state *a rapid method* of rendering a new state decision law enforceable." (Emphasis supplied.)

> We do not reach the question as to the authority of the Department of Justice to extend the 60 day period by the promulgation of proposed guidelines to the administration of Section 5. They were not in force and effect as of the date of this submission. We hold that the Attorney General of Arizona complied with the provisions of § 5 by his submission on July 8, 1971; that the 60 day period provided in § 5 of the Voting Rights Act of 1965, terminated upon the expiration of 60 days from the receipt of the submission by the Attorney General of the United States, i.e., September 10, 1971; that the Attorney General of the United States has not interposed an objection within the 60 day period following submission, and therefore, the Arizona law, Chapter 151 of the Laws of 1970, may be enforced.

The Commonwealth does not dispute the right of the Attorney General of the United States to request additional information in order that he may comprehensively analyze the change submitted, nor his right to take, after the sixty-day period, appropriate legal steps in a proper court to enjoin enforcement of a change. The Commonwealth's position is simply that sixty days is still sixty days. Unless the Attorney General of the United States interposes an objection to a change within the allotted time, then the change may be enforced unless the Attorney General or a private party succeeds in obtaining an injunction with respect to such implementation.

Any analysis of Section 5 and the reason for the sixty-day period must of necessity be made with due regard to the nature of the Voting Rights Act, which was explicitly set forth by Mr. Justice Black as follows:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our con-

stitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. * * * A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 358-360, 15 L.Ed.2d 769, 86 S.Ct. 803 (1966).

While recognizing the intrusion into the power of the States which Section 5 constitutes, this Court found that Congress, under the compulsion of unique circumstances documented by legislative history, responded in a permissibly constitutional manner. Yet that intrusion was tempered, for under Section 5 it is not necessary that a covered State obtain a declaratory judgment action before it can enforce any change in its election law. Congress' legitimate concern regarding its potential disruptive effect on State governmental operations is reflected in the provision for submission to the Attorney General as a rapid method of rendering a new law enforceable.

This Court has confirmed the sixty-day period as a means of rapid review fully cognizant of the breadth and type of changes which must be submitted to the Attorney General. See *Perkins* v. *Mathews, supra.* Additionally, the legislative history shows no congressional intent contrary to the proposition that the sixty-day period in question means sixty days. See *"Legislative History of Voting Clearance Procedure Authorized By Sections 3(c) and 5 of the 1965 Voting Rights Act,"* (A. p. .....). Not only does the legislative history of the 1965 Act provide no justification for this Court's extending the sixty-day period, the legislative history of the 1970 Amendments to the Voting Rights Act confirms that the sixty days commence upon the date of any submission.

When amendments to the 1965 Voting Rights Act were being proposed in the 91st Congress, the Attorney General of the United States requested five amendments to the Act. The fourth amendment proposed is pertinent to a consideration of the sixty day period. In that request the Attorney General asked that the submission requirements of Section 5 of the Act be abolished and that "the courts, on application of the Attorney General, would be permitted to temporarily enjoin discriminatory voting laws and to freeze any new voting laws passed by the State or county against whom the law suit is filed." The Attorney General gave the rationale behind this recommendation to be:

> Because of the nature of elections and the fact that it is difficult at a much later date to correct the result of any illegal inequities, I believe that the Attorney General should have the discretion, in cases which appear to have serious consequences, to ask the Court to temporarily freeze the situation in a particular county.
>
> This was basically the philosophy adopted by the 1965 Voting Rights Act which provided that no elec-

tion laws passed by States covered by the Act could be changed without approval of either the courts or the Attorney General. In contrast to the 1965 Act, our proposal leaves the decision to the court, where it belongs; and properly places the burden of proof on the government and not the States.

The reasoning for replacing Section 5 of the Act with the Attorney General's suggested changes was fully set forth:

> The pre-clearance requirements of Section 5 of the 1965 Act has been difficult to administer effectively. To date there have been some 345 submissions to the Department of Justice. *We have sixty days to determine if a law has a discriminatory purpose or effect. Unless we are extremely familiar with the political structure of a given jurisdiction or are capable of detailing investigators to make appropriate inquiry or receive complaints from local sources—it is virtually impossible to know if changes in the rules of a state election board, relocation of a polling place, consolidation of an election district, or some technical change in the election laws has such a discriminatory purpose or effect.* 91st Cong. 2d Sess., Vol. 116, Congressional Record, No. 30, p. S2752-53.

It is thus clear from legislative history that (1) there can be no meaning applicable to the sixty day period other than it ends sixty days from initial submission and that (2) Congress very clearly realized the amount of work required by the Attorney General in order to comprehensively review material within the sixty day period; that the Attorney General desired the sixty day period abolished because of the problems of administrative review; that nevertheless Congress did not abolish the sixty day submission period; and that Congress intended to have the Attorney General

continue his administrative review in the period aforementioned.

Since with respect to the House reapportionment plan here in question the Attorney General interposed no objection within the sixty day period provided by Section 5 of the Act, the plan became enforceable on May 1, 1971, in the absence of any court order to the contrary, and the Attorney General's subsequent raising of objection on May 7, 1971, and his withdrawal of objection on June 10, 1971, were without legal effect.

In conclusion, the Commonwealth has fully complied with the requirements of the Voting Rights Act as to the legislative reapportionment plans adopted by her General Assembly. Black appellants, faced with a "traditional suit", have failed to carry their burden of proving the eixstence of invidious discrimination. The plans, therefore, pass muster under both the Act and the Fourteenth Amendment.

CONCLUSION

Nothing in the Federal Constitution nor past decisions of this Court prevents a State from choosing a legislative structure it deems best suited to the interests, temper and customs of its people provided population equality is maintained. The Virginia General Assembly chose carefully the thesis of its plan—single member districts in its upper chamber and recognition of political jurisdictions in its lower chamber. The plans adopted were ones with the least population deviation the thesis would permit. The lower court unjustifiably discarded Virginia's plans in the Senate, on a theory which rejects legislative adoption of the Bureau of Census' method of enumeration and in the House of Delegates on a theory based on the tyranny of numbers. If state governments, are to continue structuring themselves in the

manner they see fit, consistent with applicable constitutional principles, such doctrines cannot stand. Additionally, the District Court in the face of all authority judicially decreed what has always been deemed primarily a task for legislative consideration and determination, locking in for the decade of the Seventies a plan devised by four individuals without hearings and substituted for the judgment of one hundred forty individual all of whom represented constituencies which make the Commonwealth of Virginia what it is—people, not numbers.

It is respectfully requested that the Court dismiss the appeal of the black appellants and affirm the validity of the legislative apportionment plans adopted by the General Assembly of Virginia at its 1971 session. In the alternative, this Court should reverse the decision of the lower court and require that the General Assembly be given an adequate opportunity to correct such constitutional deficiencies in the said plans as may be found.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

VANN H. LEFCOE
Assistant Attorney General

Supreme Court–Library Building
Richmond, Virginia 23219

ANTHONY F. TROY
Special Assistant Attorney General

800 Federal Bar Building West
Washington, D. C. 20006

CERTIFICATE

I, Anthony F. Troy, Special Assistant to the Attorney General for the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, hereby certify that three (3) copies of the foregoing Brief on Behalf of Appellants as well as three (3) copies of Appendix were on this 30th day of June, 1972, mailed to Edmund D. Campbell, Esquire, Counsel for Appellees Clive L. DuVal, II, et al., 1425 H. Street, N.W., Suite 822, Washington, D.C. 20005; Stanford E. Parris, Esquire, Counsel for Appellees Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr,, Assistant City Attorney of the City of Norfolk, Counsel for Defendant-Intervenor City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23501; John Ashton, Esquire, Counsel for Defendant-Intervenor City of Virginia Beach, Hunton, Williams, Gay, Powell and Gibson, P. O. Box 1535, Richmond, Virginia 23212; The Honorable Henry E. Howell, Jr., Counsel for Appellees Henry E. Howell, Jr., et al., 808 Maritime Tower, Norfolk, Virginia 23510; Armand Derfner, Esquire, Lawyers' Committee for Civil Rights Under Law, 520 Woodward Building, 733-15th Street, N.W., Washington, D. C. 20005, Counsel for Plaintiff-Intervenors William S. Thornton, et al. All parties required to be served have been served.

ANTHONY F. TROY
Special Assistant to the
Attorney General of Virginia